107

Case No. 07

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIAM SILVERSTEIN

Petitioner,

vs.

EXPERIENCED INTERNET.COM, INC., PATRICIA QUESADA,
SYLVIA BEDOYA and DOES 1-50

Respondents.

On Appeal to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit affirmed the District Court's refusal to exercise jurisdiction over Respondents Experienced Internet.com, Inc., Patricia Quesada and Sylvia Bedoya for sending unsolicited email advertisements with pornographic content in violation of the law.

Two questions are presented:

1. Whether a defendant can avoid the exercise of personal jurisdiction by filing an affidavit claiming that some unnamed third party was responsible for Plaintiff's damages.
2. Whether the district court erred in refusing to allow discovery to determine the true facts regarding jurisdiction.

LIST OF PARTIES

The parties are listed in the caption. To the extent that Respondents claim that some other parties have an interest in the action, they have failed to identify such third parties.

CORPORATE DISCLOSURE STATEMENT

Petitioner William Silverstein is the sole proprietor of an Internet service provider with his principal place of business in Los Angeles, California.

TABLE OF CONTENTS

	Page
Questions Presented	ii
List Of Parties	ii
Corporate Disclosure Statement	ii
Table Of Contents	iii
Table Of Authorities	v
Table Of Appendices	vi
Opinions Below	1
Statement Of Jurisdiction	1
Statutory Provisions Involved	1
Statement Of The Case	2
Reasons For Granting Of The Writ	3
I. Review Is Warranted To Resolve A Conflict Concerning The Exercise Of Jurisdiction.	5
A. The Sixth Circuit Has Found That A Defendant May Not Avoid Exercise Of Personal Jurisdiction On The Mere Basis Of Contrary Assertions	5
B. The District Court Should Have Exercised Personal Jurisdiction Because Injury In The Forum Warrants The Exercise Of Personal Jurisdiction	6

1. California May Exercise Specific Jurisdiction Over Those Who Intentionally Direct Email Advertising To California Residents. 6

2. California Courts May Exercise Jurisdiction Over Commercial Email Senders 8

3. Defendants Should Be Subject to General Jurisdiction 9

4. Respondents Operate A Commercial Web Site 9

5. Defendants Should Not Be Allowed To Avoid The Exercise Of Jurisdiction By Pointing The Finger At Someone Else 10

C. The Court Erred In Refusing To Allow Discovery 11

Conclusion 12

Certificate Of Word Count 13

TABLE OF AUTHORITIES

CASES	Page
Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1994)	7
Compuserve , Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)	5
Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957)	4
Core-Vent Corp. v. Nobel Industries AB, 11 F.3d 1482 (9th Cir. 1993).	6, 7
Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997)	9, 10
Data Disc, Inc. v. Systems Tech. Assocs., Inc., 557 F.2d 1280 (9th Cir. 1977)	8
Edias Software Int'l, L.L.C. v. Basis Int'l Ltd., 947 F.Supp. 413 (D. Ariz 1996)	7
Ferguson v. Friendfinders, Inc., 94 Cal.App.4th 1255 (Cal. Ct. App. 2002)	8
Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984)	6
Hughes v. Tobacco Institute, Inc., 278 F.3d 417 (5th Cir.2001).	10
International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945).	6

Jenkins v. McKeithen, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed. 2d 404 (1969) 10

Machulsky v. Hall, 210 F.Supp.2d 531 (D.N.J. 2002) 10

Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952) 8

Professional Investors Life Ins. Co. v. Roussel, 445 F.Supp. 687 (D.Kan. 1978) 5

Verizon Online Services, Inc. v. Ralsky, 203 F.Supp.2d 601 (E.D.Va.2002) 8

Zippo Manufacturing Company v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (E.D.Pa. 1997) 9, 10

TABLE OF APPENDICES

Appendix A — Order Granting Motion to Dismiss (N.D.Cal. July 11, 2005)

Appendix B — Order Denying Motion For Leave To File Motion for Reconsideration (N.D.Cal. August 25, 2005)

Appendix C — Memorandum Opinion (9th Cir. February 14, 2008)

Appendix D — Plaintiff's Request For Judicial notice In Support Of Plaintiff's motion For Leave To File Motion For Reconsideration Of Order Dismissing Action (N.D.Cal.PACER Document 26, filed August 9, 2005

OPINIONS BELOW

The findings of fact of the district court are provided in an unpublished decision. The conclusions of law of the district court are similarly recorded in an unpublished decision. The final judgment of the district court is recorded on PACER. The Ninth Circuit decision of February 14, 2008, is also unreported.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The judgment of the district court was entered on August 25, 2005. A notice of appeal was filed on September 23, 2005, and the case was docketed in the court of appeals on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Petitioner filed a timely petition for writ of certiorari on May 8, 2008.

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 7705(a):

> The Commission may issue regulations to implement the provisions of this Act (not including the amendments made by sections 4 and 12). Any such regulations shall be issued in accordance with section 553 of title 5.

15 U.S.C. § 7706(g):

> (1) Action authorized
> A provider of Internet access service adversely affected by a violation of section 7704 (a)(1), (b), or (d) of this title, or a pattern or practice

that violates paragraph (2), (3), (4), or (5) of section 7704 (a) of this title, may bring a civil action in any district court of the United States with jurisdiction over the defendant—

(A) to enjoin further violation by the defendant; or

(B) to recover damages in an amount equal to the greater of—

(i) actual monetary loss incurred by the provider of Internet access service as a result of such violation; or

(ii) the amount determined under paragraph (3).

16 C.F.R. Part 316(a)(1):

> (a) Any person who initiates, to a protected computer, the transmission of a commercial electronic mail message that includes sexually oriented material must:
>
> (1) Exclude sexually oriented materials from the subject heading for the electronic mail message and include in the subject heading the phrase ``SEXUALLY-EXPLICIT:'' in capital letters as the first nineteen (19) characters at the beginning of the subject line;\1\

\1\ The phrase ``SEXUALLY-EXPLICIT'' comprises 17 characters, including the dash between the two words. The colon (:) and the space following the phrase are the 18th and 19th characters.

STATEMENT OF THE CASE

Plaintiff conducts business as an Internet Service Provider. Beginning in March, 2004, Defendants initiated email advertising to William Silverstein's

equipment located in the State of California for the purpose of relaying pornographic unsolicited electronic mail advertisements. The email messages' subject lines did not contain any warning that the body of the email contained sexually explicit content in violation of federal law. Federal regulations require a warning in the subject line that the body of the email contains sexually explicit content. (16 C.F.R. Part 316.)

Defendants' servers are hosted by a California company. Defendants admit to doing business in California. Defendants admit to operating an affiliate program with affiliates in California. Defendants' web site is set up to accept California customers. Defendants use a payment processing service in California. Defendants intended to solicit customers in California.

Defendants claimed that all of the activities alleged in the complaint were undertaken by some other person, and that they merely "leased" the domain name to the unnamed third party and collected money on its behalf.

Respondents filed a certificate of interested parties pursuant to local rule, but the certificate did not contain any name other than those of Respondents.

Respondents refused to disclose the identity of the person or persons they claimed to be actually liable for the alleged torts.

REASONS FOR GRANTING OF THE WRIT

Petitioner should only need to make a *prima facie* showing of personal jurisdiction. (*Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1187 (9th Cir. 2002).) In determining whether Petitioner has

met his *prima facie* burden, uncontroverted allegations in the complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in favor of Petitioner. (*Id.* (quoting *Am. Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996)).) Moreover, evidentiary materials are construed in the light most favorable to Petitioner and all doubts resolved in his favor. (*Id.* (quoting *Metro. Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1064 n. 1 (9th Cir. 1990)).) "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (*Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L.Ed.2d 80 (1957).)

Petitioner's Verified First Amended Complaint and evidentiary materials submitted pursuant to requests for judicial notice made a *prima facie* showing that the exercise of personal jurisdiction was reasonable under the circumstances, and Defendants made only cursory denials, so the lower court erred both in dismissing the case, and in refusing to allow even limited discovery into jurisdictional facts.

Review by this Court is necessary to address a split of authority with regard to whether a defendant may simply dispute jurisdictional facts and thereby defeat the exercise of personal jurisdiction.

Review of this case is essential to inform litigants whether a defendant can avoid personal jurisdiction by filing a declaration pointing the finger at an unnamed third party.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE EXERCISE OF JURISDICTION.

A. The Sixth Circuit Has Found That A Defendant May Not Avoid Exercise Of Personal Jurisdiction On The Mere Basis Of Contrary Assertions

The district court in the instant case stated that "Plaintiff submits no competent evidence to rebut Defendant's declarations attesting that they are not doing business in California... do no advertising in California... and did not cause any of the subject email to be sent to anyone in California." The Court ignored the allegations of the Verified Complaint, despite *Runnels v. Rosendale*, 499 F.2d 733, 734 n. 1 (9th Cir. 1974), cited in the district court's second footnote.

Defendants should not be allowed to "avoid personal jurisdiction simply by filing an affidavit denying all jurisdictional facts". (*Compuserve Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996).) "[B]ald denials of pleaded facts" are insufficient to overcome the exercise of jurisdiction. (*Professional Investors Life Ins. Co. v. Roussel*, 445 F.Supp. 687, 692 9 (D.Kan. 1978).)

Defendants intentionally set up their business in a manner designed to avoid responsibility for bad acts. Their claim that some unnamed third party is the true bad actor allows them to evade responsibility while the unnamed third party vanishes like a ghost.

B. The District Court Should Have Exercised Personal Jurisdiction Because Injury In The Forum Warrants The Exercise of Personal Jurisdiction

Where no applicable federal statute governs personal jurisdiction, federal courts apply the law of the state in which the Court sits. (*See Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d, 1482, 1484 (9th Cir. 1993).) The federal cause of action in this case is brought under the CAN-SPAM Act, codified at 15 U.S.C. sections 7701, *et seq*. Pursuant to Section 7706(g), a provider of Internet access service may bring a civil action for violations of CAN-SPAM "in any district court of the United States with jurisdiction over the defendant." Because the federal law does not specify the court's jurisdictional reach for these claims, state law governs. (*Core-VentCorp.*, 11 F.3d at 1484.)

California's long-arm statute allows courts to exercise personal jurisdiction over defendants to the extent permitted by the Due Process Clause of the United States Constitution. (*See* Cal. Civ. Proc. § 410.10 ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."); *see also Core-Vent*, *supra*, 11 F.3d at 1484.)

Due process requires that "in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (*International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945). Under the due process analysis, a state may exercise either general or specific jurisdiction over a defendant. (*See*

Helicopteros Nacionales de Colombia, S.A. v. Hall; 466 U.S. 408, 414-15 (1984).)

The fact that Respondents sent unsolicited commercial emails from their places of business does not control, because the liability did not arise until the emails went through Internet services providers' servers and were received by Plaintiff and his customers in California.

1. **California May Exercise Specific Jurisdiction Over Those Who Intentionally Direct Email Advertising To California Residents.**

Defendants sent unlawful email advertising to equipment located within California. They should not now be rendered immune by the implied claim that they have not exacted sufficient economic benefit from the forum to make it worth their while to defend a lawsuit alleging harm that resulted from Defendants' unlawful activities.

The "effects test" established in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1994) allows the exercise of personal jurisdiction based upon "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered - and which the defendant knows is likely to be suffered - in the forum state." (*Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1486 (9th Cir. 1993).)

Email messages can serve as the basis for the exercise of jurisdiction on this basis. (*Edias Software Int'l, L.L.C. v. Basis Int'l Ltd.*, 947 F.Supp. 413, 420 (D. Ariz 1996).) "Allowing Defendant to escape personal jurisdiction in a forum they exploited for pecuniary gain while causing a tort to a ... resident

would constitute a manifest unfairness". (*Verizon Online Services, Inc. v. Ralsky*, 203 F.Supp.2d 601, 604 (E.D.Va.2002) .)

2. California Courts May Exercise Jurisdiction Over Commercial Email Advertisers

Sending millions of email messages to persons in a specific forum constitutes "activities within a state [that] are 'substantial' or 'continuous and systematic'." (*Data Disc, Inc. v. Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952).) Plaintiff's verified Complaint demonstrates that the Defendants have directed commercial advertising at California residents repeatedly, including Plaintiff and his customers.

The nature of email advertising suggests that the Defendants have been sending their messages to many other California residents besides Plaintiff. (*See Ferguson v. Friendfinders, Inc.*, 94 Cal.App.4th 1255, 1265 (Cal. Ct. App 2002) (acknowledging that "unsolicited email advertising is sent in 'bulk' "); *see also Verizon, supra,* 203 F.Supp.2d at 606 (defining spam as "an unsolicited, often commercial, message transmitted through the Internet as a mass mailing to a large number of recipients") (quoting MICROSOFT ENCARTA COLLEGE DICTIONARY 1383 (2001).)

Causing multiple email messages to go to each of thousands or perhaps millions of residents is substantial activity. The Defendants have been benefiting economically from advertising directed to California residents. They should not have the luxury of paying people to send their ads into California,

accepting money from California residents (who buy the advertised products), and then being able to avoid responsibility for their actions by filing an affidavit that is a bare denial of jurisdictional facts.

3. Defendants Should Be Subject to General Jurisdiction

Defendants admit to commercial relationships with multiple California companies, including a web host (iPowerWeb) and a credit card processing company (Paycom.net). In addition, they programmed their web site to accept California residents as customers, evidenced by the form that lists California within a pick box. All of the relationships Defendants have with California companies add up to systematic and continuous contacts with the state. The bare assertions in their affidavits do not deny these jurisdictional facts.

4. Respondents Operate A Commercial Web Site

Defendants' web site is an active web site. The nearly universally accepted test arose from the case of *Zippo Manufacturing Company v. Zippo Dot Com, Inc.* (E.D.Pa. 1997) 952 F.Supp. 1119. (*See, e.g., Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997) (quoting *Zippo* with approval).) *Zippo* sets forth the framework for determining "the nature and quality" of activity on the Internet. (*Zippo, supra*, 952 F.Supp. at 1124.) One federal court decision explains that the first part of the *Zippo* test is to determine the "interactivity level" of a web site at issue. "Internet sites have been categorized in three ways, according to interactivity levels: (1) interactive sites used to conduct business over the Web; (2) semi-interactive sites allowing the exchange of information with a host computer; and (3) passive sites allowing access to information but not enabling the exchange

of information with a host computer." (*Machulsky v. Hall* (D.N.J. 2002) 210 F.Supp.2d 531, 538-39.)

When the Internet communication is via the World Wide Web, the use of interactive web sites for commercial purposes should result in jurisdiction, and the use of passive web sites should not. (*See Zippo, supra*, 952 F.Supp. at 1124; *Cybersell, supra,* 130 F.3d at 419-20 (stating that passive web site does not constitute purposeful availment).)

In this case, the Defendants' web site is specifically programmed to accept customers in California and advertises that it already has female customers in Los Angeles. The web site is a highly interactive commercial web site and the exercise of general jurisdiction should be appropriate under the *Zippo* test. That the web site automatically interacts with California customers by using a payment processing company in California further warrants the exercise of general jurisdiction.

5. Defendants Should Not Be Allowed To Avoid The Exercise of Jurisdiction By Pointing the Finger At Someone Else

For purposes of a motion to dismiss, the plaintiff's allegations are taken as true, and the Court must construe the complaint in the light most favorable to the plaintiff. (*Jenkins v. McKeithen*, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed. 2d 404 (1969).) "[T]he central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief." (*Hughes v. Tobacco Institute, Inc.*, 278 F.3d 417, 420-21 (5th Cir.2001).)

Plaintiff has shown that advertising directed at California residents ultimately benefited Defendants

by driving traffic to their domain name. Defendants will allow only that they "facilitated" the business of selling a sexually explicit web site through sexually explicit email advertising in violation of federal law.

Northern District Local Rule 3-16(b)(1) requires that each party must "disclose any persons... known by the party to have either: (i) a financial interest (of any kind) in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding." Defendants should not be able to simply assert that unnamed "customers" in privity are the true beneficiaries of the unlawful advertising without actually identifying that person they allege to be the responsible party.

To avoid the exercise of jurisdiction, a defendant must show compelling evidence. Defendants have not presented any uncontroverted facts which would show that the exercise of jurisdiction would be unreasonable. Allowing tortfeasors to shift harm to legitimate businesses prevents a level playing field and allows them to avoid jurisdiction by merely denying allegations in a Verified Complaint facts still at issue allows them to avoid the bright light of truth.

The Defendants' conduct and connections to the forum are of the Defendants' own choosing. Neither Plaintiff nor his customers ever requested to receive any pornographic email communication from Defendants.

C. The Court Erred In Refusing To Allow Discovery

Petitioner requested that he be allowed to conduct discovery into the claims of Defendants that California courts may not exercise jurisdiction. The

Court should have allowed Petitioner to make discovery requests limited to the question of personal jurisdiction, particularly since Respondents were claiming that some unnamed entity, known to them but not disclosed in the certificate of interested parties, was the true responsible party. Discovery would have revealed evidence showing Defendant's true connections to the "third party" they claimed to be responsible, and would also have shown specific connections to California sufficient to support the exercise of general jurisdiction. (*See, e.g.*, Appendix "D", Plaintiff's Request For Judicial Notice (suggesting that Defendants' actually operated their business using an address in California).)

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

July 14, 2008

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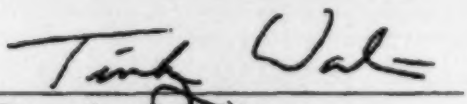

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